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No. 99-1335

Supreme Court, U.S.
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In The

Supreme Court of the United States

SECURITY FINANCE CORP., WORLD ACCEPTANCE CORPORATION, BELL FINANCE COMPANY OF ARDMORE, INC., TLB SUN LOAN COMPANY NUMBER 1, INC., HENNESSEE, INC., AND QUAD STATES SERVICES, INC.,

Petitioners,

versus

EARL CLARK, ACTING ADMINISTRATOR, OKLAHOMA DEPARTMENT OF CONSUMER CREDIT, and the OKLAHOMA DEPARTMENT OF CONSUMER CREDIT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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March 1, 2000

2200

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Oklahoma to apply its Order retroactively results in the taking of property without due process of law.

PARTIES

The parties to this appeal before the Supreme Court of Oklahoma were the Independent Finance Institute, Your Credit, Inc., Noble Finance Corporation, Advance Loan, Inc., Express Loan, Inc., Cash Loan, Inc., Central Loan, Inc., Modern Loan, Inc., Signature Loan, Inc., Tide Finance, Inc., United Finance Co., Inc. of Oklahoma City, First Capital Finance Co., Ardmore Finance Corp., Surety Finance Service, Inc., Master Finance Corp., Gill Finance Corp., Don's Inc., d/b/a Commerce Finance of McAlester, World Acceptance Corporation, Security Finance Corp., Quad States Services, Inc., Bell Finance Company of Ardmore, Inc., Hennessee, Inc., TLB Sun Loan Company Number 1, Inc., Western Shamrock Corp., Budget Finance Co., Rayco Loan Services, Inc., Money Services, Inc., Kent Finance Co., Cash Credit, Inc., d/b/a Public Finance Com., Emily Corp., and Oklahoma Small Loan Association, plaintiffs in the District Court, appellees in the Supreme Court of Oklahoma and petitioners herein and Earl Clark, Acting Administrator of the Oklahoma Department of Consumer Credit and the Oklahoma Department of Consumer Credit, defendants in the District Court and the appellants in the Supreme Court of Oklahoma.

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OPINIONS BELOW

The May 11, 1999 Order of the Supreme Court of Oklahoma, as amended on limited rehearing by the November 4, 1999 Order, were released for official publication and appear at *Independent Finance Institute v. Clark*, 990 P.2d 845 (Okla. 1999). These Orders are set forth in the Petitioners' Appendix.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order and Order on Rehearing of the Supreme Court of Oklahoma, Case No. 89,504, filed and entered by that Court on May 11, 1999, and November 4, 1999, respectively. Petitioners state that jurisdiction in this Court is conferred under 28 U.S.C. § 1257 (1993); however, the validity of a statute was never drawn in question. In the District Court, Petitioners sought a declaratory judgment and permanent injunction enjoining Respondents from implementing, enforcing or otherwise acting upon Attorney General Opinion No. 96-84. The Order of the Supreme Court of Oklahoma at footnote 19 recognized that the constitutionality of 14A O.S. §3-508B has been raised in another case, but that question was not asserted nor was the issue raised in this appeal. The due process questions raised have been that the enforcement of the Attorney General Opinion and a retroactive application of the Order of the Supreme Court of Oklahoma would violate constitutional rights, not that any of the statutes involved were unconstitutional.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Constitution, Art. 2, §7. Due process of law.

No person shall be deprived of life, liberty, or property, without due process of law.

Relevant portions of OKLA. STAT. tit. 14A, §§ 3-205 and 3-508A (1991) and § 3-508B (Supp. 1999), the Uniform Consumer Credit Code, are set forth in the Petitioners' Appendix. Relevant portions of OKLA. STAT. tit 14A, §3-508B (1991) and § 3-205 (Supp. 1999), the Uniform Consumer Credit Code, are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Following discussions with veteran staff and industry, the Administrator of the Oklahoma Department of

Consumer Credit[1] requested a formal opinion from the Oklahoma Attorney General about the statutory interpretation of refinancing of consumer loans under 14A O.S. 1991, § 3-508B.

On February 20, 1997, the Oklahoma Attorney General issued Opinion No. 96-84 ("Opinion") in which he opined:

> When refinancing a small consumer loan - less than $640 - supervised lenders, under the provisions of 14A O.S. 1991, § 3-508B, may not impose an acquisition charge or an installment account handling charge in lieu of the finance charge permitted under 14A O.S. 1991, § 3-508A.

The Oklahoma Department of Consumer Credit ("Department") announced the Opinion to the industry on February 21, and on February 26, notified the industry that the Opinion would be enforced effective March 3. On February 27, Petitioners filed a Petition for declaratory judgment and permanent injunction seeking to enjoin Respondents from implementing, enforcing or otherwise acting upon the Opinion.

The District Court of Oklahoma County issued the permanent injunction against Respondents finding that the footnote was not a part of the statutes and was not part of Oklahoma law, and the Department had allowed loans made under 14A O.S. 1991, § 3-508B to be refinanced under 14A O.S. 1991, § 3-508B for twenty-seven years. Respondents

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[1] On March 26, 1997, the Commission on Consumer Credit terminated this Administrator following an executive session in which discussions are confidential.

appealed the decision, and the appeal was heard by the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma issued its Order on May 11, 1999, reversing the District Court's decision and dissolving the permanent injunction. The holding stated:

> Because of the strictures of 14A O.S. 1991, § 3-205, lenders who refinance supervised loans, whether initially made under either § 3-508A or § 3-508B, are limited to assessing loan finance charges permitted by 14A O.S. 1991 § 3-508A.

Petitioners filed a Petition for rehearing and for clarification, and a limited rehearing was heard by the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma issued its Rehearing Order on November 4, 1999. The Rehearing Order limited the Court's pronouncement to "section 3-508B loans refinanced between March 3, 1997, and August 29, 1997," and the Court found:

> [N]o hardship or inequity in applying this decision to refinancing agreements entered into after the Administrator gave notice on March 3, 1997. After the letter of enforcement was sent, lenders were on notice that the lesser charges of subsection 3-508A might apply to refinancing of subsection 3-508B loans.

REASONS FOR DENYING THE WRIT

A Writ of Certiorari should not be granted in this case for several reasons.

First, grounds for jurisdiction in this Court cannot be conferred under 28 U.S.C. § 1257(1993), because the validity of a statute was never drawn in question. As stated on page 1, the actions sought in District Court were a declaratory judgment and permanent injunction enjoining Respondents from implementing, enforcing or otherwise acting upon Attorney General Opinion No. 96-84. The Order of the Supreme Court of Oklahoma at footnote 19 recognized that the constitutionality of 14A O.S. § 3-508B has been raised in another case, but that question was not asserted nor was the issue raised in this appeal. The due process questions raised have been that the enforcement of the Attorney General Opinion and a retroactive application of the Order of the Supreme Court of Oklahoma would violate constitutional rights, not that any of the statutes involved were unconstitutional. However, if this Court grants a Writ of Certiorari, the Petitioners' second question should not be considered since the constitutionality of 14A O.S. § 3-508B was not asserted nor raised in this case.

Second, there are no conflicts between this Court's decisions or federal court decisions from other jurisdictions and the Order issued by the Supreme Court of Oklahoma. Petitioners quote *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), *U.S. v. Morehead*, 959 F.2d 1489, 1512 (10th Cir. 1992), and *In re Daniel, Deborah and Leslie H.*, 591 P.2d 1175, 1177 (Okla. 1979) for their proposition that the retroactive application of the Order would impose a duty with which Petitioners had no prior notice or opportunity to comply. Petitioners cannot contend that they did not have

fair warning to know what was prohibited. The Opinion was requested on August 1, 1996, was issued on February 20, 1997, was announced to the industry on February 21, and on February 26, the industry was notified that the Opinion would be enforced effective March 3. Since there was a dispute about the statutory interpretation, Petitioners cannot claim that the affirmation of the Attorney General Opinion was unforeseeable and unexpected before they continued to refinance B loans under the provisions of 14A O.S. 1991, § 3-508B. In its Rehearing Order, the Supreme Court of Oklahoma found:

> [N]o hardship or inequity in applying this decision to refinancing agreements entered into after the Administrator gave notice on March 3, 1997. After the letter of enforcement was sent, lenders were on notice that the lesser charges of subsection 3-508A might apply to refinancing of subsection 3-508B loans.

Third, there is no public policy issue with regard to the B lenders. 14A O.S. § 3-508B is unique to Oklahoma, and the state court of last resort in Oklahoma interpreted its law and found no violation of constitutional rights since the B lenders had notice. The public policy issue in this case is with the tens of thousands of consumers that were overcharged by B lenders that continued to refinance B loans under 14A O.S. 1991, § 3-508B, as they are entitled to refunds and deserve no less.

In reviewing the state statutes in question, the Supreme Court of Oklahoma applied common rules of construction. Although Petitioners place much emphasis on the length of time that B lenders were allowed to refinance

B loans under 14A O.S. 1991, § 3-508B, the Court found that the Department's construction was unreasonable and clearly wrong. Thus, the deference rule was inappropriate. In determining legislative intent, first, the Court found that the 1997 legislative amendments did not change the statute, but clarified it and supported the Attorney General Opinion. The amendments codified a compromise between what B lenders had been charging and what they should have been charging when B loans were refinanced. If B lenders had charged what they should have been charging, then they would have earned less when B loans were refinanced than when the loans were originally made. Under the amendments, B lenders do earn less when refinancing B loans than when the loans are originally made, although not as much less as under the provisions in 14A O.S. 1991, § 3-508A. The amendments did not change this underlying precept, but moved the refinancing provisions from 14A O.S. 1991, § 3-508A to 14A O.S. Supp. 1999, § 3-508B. The Court's conclusion that B loans could not be refinanced under 14A O.S. 1991, §3-508 B concerned which charges were correct, not the section number. Second, the Court indicated that once the Legislature became aware of the statutory inconsistency, it enacted amendments. Thus, the Legislature could not have acquiesced in the Department's interpretation, because it did not have notice of it. Third, the Court found that the footnote did not change the substantive meaning of the statute as originally intended by the Legislature so it became a part of the statute.

Oklahoma has adopted the federal retroactivity analysis that requires retroactive application of a new civil-law (non-criminal) rule that was applied to the parties in the case in which it was announced. *Strelecki v. Oklahoma Tax Comm'n,* 872 P.2d 910, 915 (Okla. 1993) citing *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993) and *James*

B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). Since this case involves a new principle of law, no due process rights are violated by the pronouncement's retroactive effect.

Applying the Order retroactively would not constitute an unreasonable confiscation of Petitioners' businesses and property in violation of the Fourteenth Amendment to the *United States Constitution* and Article 2, Section 7 of the *Oklahoma Constitution*. Reducing the refinancing rate on B loans from the provisions in 14A O.S. 1991, § 3-508B to 14A O.S. 1991, § 3-508A does not necessarily mean no reasonable return since B lenders would be allowed to charge the maximum amount under 14A O.S. 1991, § 3-508A, which is 30% APR. Petitioners' inability to conduct business as they had heretofore done does not make the rate confiscatory. With the 1997 legislative amendments, B lenders had to make some business changes, and absent those legislative amendments, B lenders would have made similar changes with the enforcement of the Attorney General Opinion.

CONCLUSION

For the above reasons, Respondents request that this Court deny a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

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March 1, 2000

APPENDIX A

RELEVANT PORTIONS OF THE OKLAHOMA UNIFORM CONSUMER CREDIT CODE

OKLA. STAT. tit. 14A, § 3-508B (1991). Loan finance charge for loans with cash advance of One Hundred Dollars or less

(1) On loans having a cash advance of One Hundred Dollars ($100.00) or less, a supervised lender may charge in lieu of the loan finance charges specified in Section 3-508A, the following amounts:

(a) on any amount up to and including Twenty-nine Dollars and ninety-nine cents ($29.99), a charge may be added at the ratio of One Dollar ($1.00) for each Five Dollars ($5.00) cash advanced to the borrower;

(b) on any cash advance in an amount in excess of Twenty-nine Dollars and ninety-nine cents ($29.99) up to and including the amount of Thirty-five Dollars ($35.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be allowed not to exceed Three Dollars ($3.00) per month;

(c) on any cash advance of an amount in excess of Thirty-five Dollars ($35.00) but not more than Seventy Dollars ($70.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be

allowed not to exceed Three Dollars and fifty cents ($3.50) per month;

(d) on any cash advance of an amount in excess of Seventy Dollars ($70.00) but not in excess of One Hundred Dollars ($100.00), there shall be allowed an acquisition charge for making the advance, not in excess of 1/10 of the amount of the cash advanced. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars ($4.00) per month.

(e) on any cash advance in an amount in excess of One Hundred Dollars ($100.00) up to and including the amount of One Hundred Fifty Dollars ($150.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advance. In addition thereto, an installment account handling charge shall be allowed not to exceed Four Dollars and fifty cents ($4.50) per month;

(f) on any cash advance of an amount in excess of One Hundred Fifty Dollars ($150.00) but not more than Two Hundred Dollars ($200.00), there shall be allowed an acquisition charge for making the advance not in excess of 1/10 of the amount of the cash advance. In addition thereto, an installment account handling charge shall be allowed not to exceed Five Dollars ($5.00) per month;

(2) The maximum term of any loan made under the terms of this section shall be one (1) month for each Ten Dollars ($10.00) of cash advance up to a maximum term of ten

> (10) months. Provided, however, that under subsections (e) and (f) the maximum terms shall be one (1) month for each Twenty Dollars ($20.00) of cash advance up to a maximum term of ten (10) months.

(3) On such loans under this section, no insurance charges or other charges of any nature whatsoever shall be permitted.

(4) The acquisition charge authorized herein shall be deemed to be earned at the time a loan is made and shall not be subject to refund. On the prepayment of any loan under this section, the installment account handling charge shall be subject to the provisions of Section 3-210 as it relates to refunds. Provisions of Section 3-203 as it relates to delinquency charges and Section 3-204 as it relates to deferral charges shall apply to loans made under the section.

OKLA. STAT. tit. 14A, § 3-205 (Supp. 1999).

Title 14A O.S. Supp. 1999, § 3-205 provides in pertinent part:

"With respect to a consumer loan, refinancing, or consolidation, other than one made under Section 3-508B of this title, the lender may by agreement with the debtor refinance the unpaid balance and may contract for and receive a loan finance charge based on the principal resulting from the refinancing at a rate not exceeding that permitted by the provisions on loan finance charge for consumer loans (Section 3-201) or the provisions on loan finance charge for supervised loans (Section 3-508A), whichever is appropriate.

. . ."